

2000

State of Utah v. Gilbert Arvizo : Brief of Appellant

Utah Court of Appeals

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Utah Attorney General; Criminal Appeals Division; Attorney for Appellee.

Julie George; Attorney for Appellant.

Recommended Citation

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff/Appellees, : Case No. 200000062-CA
v. :
GILBERT ARVIZO : Priority 2
Defendant/Appellant. : Appellant in Custody

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION FOR VIOLATION OF UTAH CODE
ANNOTATED §76-5-103, AGGRAVATED ASSAULT, A SECOND
DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN
AND FOR TOOELE COUNTY, THE HONORABLE DAVID S. YOUNG
PRESIDING.

JULIE GEORGE (6231)
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UTAH ATTORNEY GENERAL
CRIMINAL APPEALS DIVISION
P.O. BOX 140854
Salt Lake City, Utah 84114-0854

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

FILED
Utah Court of Appeals
JUL 21 2000
Julia D'Alesandro
Clerk of the Court

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

FILED
Utah Court of Appeals

AUG 22 2000

Paulette Stagg
Clerk of the Court

JAMES R SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

August 22, 2000

Paulette Stagg
Clerk of the Court
Utah Court of Appeals
450 South State #500
Salt Lake City, Utah 84114-0230

RE: State of Utah v. Gilbert Arviso
Case no. 200000062-CA

Dear Ms. Stagg:

The State has reviewed the record in this case as well as the Brief of Appellant and believes that the brief complies with the requirements of Anders v. California, 386 U.S. 738 (1967) and State v. Clayton, 639 P.2d 168 (Utah 1981). The State agrees that this case presents no nonfrivolous issues for appeal. Therefore, defendant's conviction should be affirmed.

If you have any questions or comments regarding the foregoing, please feel free to call me at 366-0177.

Sincerely,

Catherine M. Johnson
Assistant Attorney General

cc: Julie George / Attorney for defendant/appellee

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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PURSUANT TO RULE 24 (a) (11) OF THE UTAH RULES OF APPELLATE PROCEDURE NO ADDENDA ARE NEEDED FOR THE ADJUDICATION OF THIS CASE.

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH, :
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Defendant/Appellant. : Appellant in custody

BRIEF OF APPELLANT

JURISDICTION

This is an appeal on behalf of Gilbert Arvizo from a jury trial conviction of one count of a violation of Utah Code Annotated §76-5-103 (1)(a), Aggravated Assault, a Second Degree Felony, in the Third Judicial District Court, in and for Tooele County, the Honorable David S. Young presiding.

This Court obtains jurisdiction to review the appeal pursuant to Utah Code Annotated §78-2a-3(2)(e) and Rule 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

Court Appointed Appellate Counsel, Julie George has reviewed the trial court file, the Court of Appeals file, the records of the Pretrial hearings, Trial and Sentencing and has determined that any issue that the Defendant/Appellant Mr. Gilbert Arvizo would wish to raise on appeal would be deemed harmless error (as set forth in current controlling case law). As Mr. Arvizo has no ground sufficient to warrant a reversal of judgment and

conviction, counsel will present in the brief any issues that may have been preserved for review on appeal and file this brief as one defined in Anders v. California, 386. U.S. 738 (1967).

In order to comply with the elements required by this Court for filing an Anders brief, counsel must do the following:

1. Review the trial court documents and transcripts in keeping with a role of an active advocate on behalf of the client with interests and loyalty to the client rather than to the court.

2. Support the client's appeal to the best of the attorney's ability.

3. In preparation of the case if the appeal is wholly frivolous, after a conscientious examination of the entire case, counsel should so advise the court and request permission to withdraw.

4. Along with a Motion to Withdraw counsel must file a brief referring to anything in the record that might arguably support the appeal.

5. A copy of counsel's brief should be furnished to the Defendant/Appellant and time allowed to the Appellant to raise any points that he chooses.

6. Once the brief has been filed and the time has expired for the Appellant to comment or brief the case, the Court, after a full examination of all the proceedings, will decide whether

the case is wholly frivolous.

7. Only when the this Court determines the appeal is indeed frivolous, the Court may grant counsel's request to withdraw and dismiss the appeal.

8. If this Court decides that the appeal is not frivolous and that any of the legal points have merit (and therefore not frivolous) it must, prior to decision, afford the Appellant the assistance of counsel to argue the appeal by way of full briefing of the issues.

State v. Clayton, 639 P.2d 168, 171 (Utah 1981), citing Anders.

STATEMENT OF THE CASE

Defendant/Appellant Gilbert Arvizo was charged by way of information on November 5, 1998 with one count of Aggravated Assault a Second Degree Felony.

On October 12, 1999 a jury found Mr. Arvizo guilty of the charge and on November 29, 1999 the Honorable Judge David S. Young sentenced Mr. Arvizo to an indeterminate term of one to 15 years in the Utah State Prison. Mr. Arvizo was levied a fine of \$1,000 and an 85% surcharge.

On November 29, 1999, Mr. Arvizo's trial attorney Scott Broadhead requested that Julie George file an appeal on behalf of Mr. Arvizo pursuant to the Public Defender agreement in Tooele County.

On December 23, 1999, Julie George filed a Notice of Appeal on behalf of Mr. Arvizo. Subsequent to the Notice counsel sent a letter to Mr. Arvizo in the Utah State Prison asking him to review the transcripts and contact her regarding issues he thought might be relevant to the appeal.

Appellate counsel filed a request for an extension of time to file the opening brief and the due date for the brief is July 20, 2000.

An Anders Brief was filed by counsel on July 21, 2000. On the same date counsel filed a Motion to Withdraw, a Request for an Extension of time to allow Mr. Arvizo to file his own brief or commentary on the brief and sent all documents to Mr. Arvizo.

In the event this Court accepts the brief and allows Mr. Arvizo the opportunity to comment on the brief or file his own brief, the final date for filing would be August 21, 2000.

RELEVANT STATUTES AND REGULATIONS

There are no relevant statutes or regulations relevant to the issues raised on appeal other than those jurisdictional provisions already cited in the brief.

STATEMENT OF FACTS

Defendant/Appellant Mr. Arvizo (hereafter referred to as Arvizo) was charged with Aggravated Assault, a Second Degree

Felony (Appellate Record 2 & 3) (hereafter referred to as R. 2 & 3). The states's first witness was Robert Martin Herrera the victim in the case. Herrera testified that he received a call from his girlfriend Traci Russell in which Russell asked Herrera to come help her move (R. 13). Herrera arrived at Russell's at approximately 5:30 p.m. on November 4, 1998 to help her move and discovered that she was not at home (R. 14). Herrera had brought two friends with him, Terry and Parry Jackson. Herrera had left work earlier that evening, picked up Terry Jackson and then picked up Terry's wife from work and proceeded to go to Russell's apartment (R. 14). Once there Herrera learned from Katherine Pinto, Russell's roommate that Russell was not home. Herrera testified that Pinto told him Russell was in Grantsville (R. 16). This is important to note as it comports with Russell's testimony later on that Herrera had duped her into driving to Granstville to meet him and he never showed up-while Russell was waiting for him in Grantsville, Herrera keep going back to Russell's apartment (R. 95).

When Herrera arrived at Russell's apartment and was told by Pinto that Russell was not there, Herrera left with the Jacksons and then returned twenty minutes later (R. 16). Herrera got out of his truck went back to the apartment, the Jacksons went with him and stood outside the apartment (R. 17). Pinto again told Herrera that Russell was still gone. This time Herrera claims he

saw Arvizo stepping from the bathroom and that Arvizo asked to talk to Herrera outside (R. 17). According to Herrera, outside the apartment the two men exchanged words and Arvizo stabbed Herrera (R. 19). Herrera went to his truck, threatened to get a gun (which he testified he really did not have) and shoot Arvizo (R. 20). Arvizo went running off down the street (R. 20).

Herrera testified that he did not have in his possession any beer, beer cans, a screwdriver, or other weapon (R. 29). He testified that he did not hit Arvizo first or initiate the fight (R. 19).

As a result of the stabbing Herrera lost ten inches of his intestine, was hospitalized for seven days and was off work for two and a half months (R. 21).

Herrera denied having a felony conviction on his record (subsequent review of the alleged conviction to be used for impeachment revealed it was a plea in abeyance and the abeyance had been executed so there was no conviction to be used to impeach) (R. 30).

Herrera denied that he was not allowed to go to Russell's apartment (based apparently on a protective order sought by Russell against Herrera (124-127) and was invited to go there (R. 34).

Patricia Jackson, known as Patty Jackson testified that Herrera picked up her husband, Terry Jackson and they went to get

beer (R. 40). The men had drank some beer as there were empty cans in the truck (R. 41). The men picked up Patty and went to Russell's apartment (R. 41). Russell was not there so they left and returned twenty minutes later (R. 42). When they returned Herrera asked Terry and Patty to get out and go with him to the apartment, in case anything happened (R. 43 & 50). According to Patty no one went inside, Arvizo came outside and began talking with Herrera (R. 43, 44). Words were exchanged with the two men, then Patty saw Arvizo swing at Herrera (R. 45). Herrera grabbed his side, said he had been stabbed (R. 45). Herrera went to his truck, Arvizo took off (R. 45) and the Jacksons took Herrera to the hospital (R. 46). Patty Jackson had not really seen an altercation between the two men before Arvizo stabbed Herrera (R. 47). After Herrera got stabbed he hit Arvizo (R. 52-53).

Terry Jackson testified next and stated that he and Herrera stopped and bought a case of Natural Light Beer after work, they drank three each and then went to get Patty from work (R. 55, 56, 69). They went to Russell's with Herrera because Herrera told them he had to help Russell move. After the first visit they returned twenty minutes later at which point Herrera told the Jacksons to come up with him because he might need them (R. 57,58). The Jacksons did not go to the door of the apartment, they waited outside (R. 58). Arvizo and Herrera came out of the apartment and a confrontation occurred (R. 59). It seemed to

Terry that the men hit each other a few times and then Herrera called out that Arvizo had "stuck" him (R. 59, 60). Terry Jackson believed that Herrera hit Arvizo first (R. 66).

Officer Steven Gowans testified that he was dispatched to the hospital in Tooele where he took reports on the stabbing (R. 71). The officer then went to look for Arvizo, found him, arrested him and took him to jail. Pursuant to the search of his person during the arrest the officer found a pocket knife (R. 73).

When the state rested its case, Arvizo's attorney called Traci Russell to the stand (R. 84). Russell testified that on the night of the stabbing she and Herrera were not dating or in a relationship (R. 90). She had not asked Herrera to come to help her move or to come to her home (R. 90). Herrera was not even supposed to be at her apartment (R. 90).

In fact, Herrera had called Russell and told her to meet him in Grantsville which is where Russell was when Herrera arrived at her apartment the first time that night (R. 90). Russell never asked Herrera to meet her at her apartment and in fact he was not supposed to be there (R. 89-91).

When Russell got home later that evening she found out that the fight had occurred (R. 86). She went outside to look if she could see blood and found a six inch screwdriver on the ground, a beer can still filled with beer that looked dented as if it had

been hit on something and a pack of cigarettes (R. 87, 88).

The last witness to testify was Arvizo himself. Although Katherine Pinto testified, an evidence custodian testified and a friend that Arvizo was staying with the night of the stabbing testified their testimony is not material to the issues presented here.

Arvizo testified that on the night of the stabbing he was at Russell's house when Herrera arrived at first (R. 105) they said hello to each other and that was all (R. 106). Herrera returned as Arvizo was going to the bathroom, Arvizo came out of the bathroom and asked if Herrera smoked and would loan him a cigarette (R. 107). Both men stepped outside to smoke and Arvizo headed to his car (R. 107).

Herrera called him over and Arvizo noticed the Jacksons standing in the shadows of the apartment complex. Herrera stated, "I ain't no punk." (R. 108). Arvizo replied, "Well, good. Well neither am I." (R. 108). Herrera replied "I'm not a fucking punk." at which point he hit Arvizo on the head with a full or nearly full can of beer (R. 108, 109, 110). Arvizo was dazed, he saw Herrera coming at him again and he reached in his pocket, grabbed his knife and stabbed Herrera (R. 111). That was the conclusion of the testimony and the jury returned a verdict of guilty on the Second Degree Aggravated Assault.

Out of the presence of the jury Arvizo asked the Court why

the protective order between Russell and Herrera was not brought in. Arvizo was apparently upset that his lawyer had not raised this issue (R. 120).

The court instructed Mr. Arvizo that a protective order between Russell and Herrera was irrelevant to the incident between Arvizo and Herrera and was not admissible (R. 127).

During the trial Judge Young stopped the testimony to admonish Arvizo to quit making "audible observations" towards Herrera while he was testifying (R. 24).

Outside of the jury's presence the court admonished Arvizo further and it is apparent from the record that Arvizo was mouthing "Fucking liar, fuck you," and other intimidating things to Herrera (R. 37). The judge threatened to have Arvizo forcibly restrained through the trial if he did not quit intimidating Herrera (R. 37, 38, 39).

SUMMARY OF THE ARGUMENT

Appellate counsel has read all of the transcripts in this case from the preliminary hearing, trial and sentence. Additionally she has reviewed the defense file, trial court file and appellate file. Counsel reviewed the case law in Utah on Aggravated Assault. Counsel also reviewed the standard for ineffective assistance of counsel claims.

Appellate counsel could find no issue relating to pre-trial

motions or issues that should have been raised that were not or that were raised and ruled on contrary to controlling statutory or case law.

There were no evidentiary issues at trial that should have been raised and were not. Additionally counsel reviewed the Presentence report and found no issues that should have been raised at sentencing and were not.

Based on this review there is no issue that was preserved in the trial court that can be raised in this Court. Nor was counsel able to locate any issue that should have been raised, and therefore preserved below, that was not raised by trial counsel. Appellate counsel therefore could find no basis for a claim of ineffective assistance of counsel.

Throughout the entire record the only issue is one of insufficient evidence to support the conviction of Aggravated Assault on the absense of any evidence being presented to show Arvizo was an aggressor rather than acting in self-defense.

However, research related to this issue shows that such an issue is without merit and does not form the basis for a reversal and remand to the trial court.

After filing the notice of appeal Mr. Arvizo wrote to counsel and wanted his appeal filed and listed the following as grounds for the appeal:

- 1) Herrera's criminal history was not introduced into trial;

- 2) The protective order was not introduced at trial; and
- 3) There was insufficient evidence to support his conviction.

After review of those issues, the record and the controlling case law it is counsel's belief that this case is one that may be disposed of pursuant to the rules established in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and reiterated in State v. Clayton, 639 P.2d 168, 171 (Utah 1981), citing Anders.

On this basis counsel will brief the issue of insufficient evidence to sustain a conviction for Aggravated Assault. The standard of review for insufficient evidence in such a case is as follows;

"The standard for determining sufficiency of the evidence is that the evidence be "so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime." State v. Romero, 554 P.2d 216, 219 (Utah 1976).

No other evidentiary issues are apparent that would warrant reversal or any possible ruling other than harmless error.

Finally the jury instructions were corrected and supplemented as requested by defense counsel and do not provide any cause for appeal. On this basis counsel will brief only the issue of insufficient evidence to support the verdict of guilty for Aggravated Assault and discuss briefly the two evidentiary

issues requested by Arvizo as appellate arguments.

ARGUMENT

THE RULE MANDATED BY THE DECISION IN ANDERS V. CALIFORNIA IS APPROPRIATELY APPLIED IN THIS CASE IN RELATION TO THE ISSUE OF INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR RETAIL THEFT.

As the facts of the case state there were two main issues that Arvizo was concerned with;

1) Herrera's criminal history and 2) the protective order.

Arvizo alludes to ineffective assistance of counsel and prosecutorial conflict of interest as well.

Arvizo's attorney presented Herrera with the question of a prior criminal history. Herrera denied a conviction. The attorney questioned him about a 1994 conviction but as it turned out the conviction was a plea in abeyance NOT a conviction and therefore could not be used as impeachment evidence.

Utah Rules of Evidence, Rule 609 provides that only a crime of a felony nature (a)(1) or a crime of dishonesty (a)(2) is admissible. Even then it must be under ten years old (b) and cannot have later been pardoned, expunged etc.(c).

Based on the nature of the conviction, a plea in abeyance, it could not have been admitted into evidence against Herrera and for that reason counsel agreed to not pursue the issue and the Court admonished the jury to disregard the testimony (R. 31).

Therefore, as much as possible about Herrera's prior criminal history, indeed more, was set out before the jury. No more could have been provided to the court and therefore there is no merit to this claim.

As to the protective order, there was really no evidence that one even existed (R.122-123). The testimony that Herrera had no right to be at the apartment was brought out through Russell and Arvizo. However, the trial court found that the protective order between Russell and Arvizo had no bearing and was therefore irrelevant in relation to the stabbing and assault between Herrera and Arvizo (R. 123-124). In the event that the Court erred in its ruling Arvizo would have to show that the trial judge abused its discretion in omitting the evidence. As the evidence was a clear exclusion under Rule 609[c] the judge did not abuse his discretion. State v. White, 880 P.2d 18 (Utah App. 1994) quoted by State v. Lindgren, 910 P.2d 1268 (Utah App 1996).

Arvizo alludes to a possible ineffective assistance of counsel claim on the basis that Scott Broadhead, his defense lawyer never objected to anything in the trial. However, as stated, a thorough review of the record shows that there was no evidence that Broadhead should have objected to and did not.

Finally, Arvizo alludes to an issue alleging that Alan Jeppson, the prosecutor, had a conflict of interest and should

not have been allowed to prosecute him. Arvizo was accused of two attempted murder for hire counts against Mr. Jeppson (R. 157) (appellate counsel George was trial counsel in the case, charges were dismissed before a trial occurred, no testimony was taken).

However, there is no case law or statute or ethical rule that provides for the disqualification of prosecutor in such a situation. The only possible issue is whether Mr. Broadhead should have brought the matter to the jury's attention in an effort to establish a defense of malicious prosecution. However, such an allegation would surely be more prejudicial than probative in this case. Such an issue of ineffective assistance of counsel should be raised in a collateral attack on the conviction such as a habeas motion.

Finally, Mr. Arvizo provides that there was insufficient evidence to support his conviction. This is a case that turns wholly on the credibility of witnesses. Mr. Arvizo was alleging that he was attacked first by Herrera with a half full can of beer and only when Herrera came charging at him again did he finally pull out his knife and stab him in self-defense. Herrera denies being the aggressor and alleged that Arvizo stabbed him in a purely unprovoked attack. The Jacksons somewhat support both sides. They support the fact that Herrera had been drinking, that Herrera asked them to come along in case he needed help, and that he threw punches at Arvizo. Russell found a Natural Light beer

can half-full and dented at the scene of the fight which supports Arvizo's theory.

The issue comes down to who the jury believed and who was more credible. At trial Arvizo was admonished twice for mouthing threats to Herrera while he testified. It was to such a degree of intolerance that the court had the jury excused and threatened to physically restrain Arvizo through the rest of the trial. It is very conceivable that Arvizo stood a reasonable chance of acquittal until the jury watched him mouthing comments to Herrera.

Regardless of what the jury saw as far as threats or intimidation, the final decision is the jury's alone and they apparently did not believe that Arvizo was not the aggressor or that the stabbing was in self-defense.

In determining whether evidence is sufficient, the Court will review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Kerekes, 622 P.2d 1161, 1168 (Utah 1980). Unless there is a clear showing of lack of evidence, the jury verdict will be upheld. State v. Logan, 563 P.2d 811, 814 (Utah 1977)."
State v. Gabaldon, 735 P.2d 410 (Utah App. 1987).

Based on the case law which seems to be on point to this issue as well as the lack of any other legitimate question for review on appeal it counsel's determination that any appeal of

the jury conviction of Arvizo is an appeal that will not warrant reversal and therefore lacks merit.

Therefore, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967), counsel has filed this brief in accordance with the provisions set forth in this State for such a case.

On this date counsel has sent the Defendant/Appellant Arvizo a letter explaining the findings of her review of the transcripts, record and case law regarding insufficient evidence cases in the State of Utah. Additionally, counsel informed Defendant/Appellant Arvizo that counsel does not believe he has grounds for an appeal of merit.

However, Defendant has the ultimate authority to make the decision regarding his appeal. Jones v. Barnes, 463 U.S. 745 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Pursuant to Defendant's instructions counsel filed an appeal on behalf of the client but counsel has had no contact with Arvizo since his intimal letter to her.

Therefore, counsel hereby requests that based upon the facts set forth above, this Court offer Defendant/Appellant Arvizo, a period of time to file a brief on his own behalf or supplement this brief filed by undersigned counsel.

PRECISE RELIEF SOUGHT

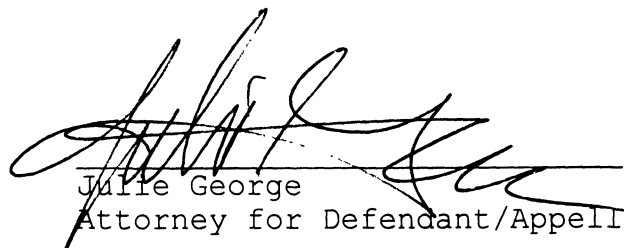
Counsel does not request oral argument or a published opinion in this case. As the requested relief, counsel requests that this Court review the record and the brief and if it determines that there is no merit to any issue for appeal that the Court grant counsel's request to withdraw and affirm the trial court ruling.

CONCLUSION

Pursuant to the law cited above it is counsel's belief that defendant has no legitimate grounds for appealing the jury conviction or the imposed sentence. It is respectfully requested that this Court allow the Appellant to have a reasonable amount of time to file a brief or commentary as to this brief if he should so decide.

Counsel has notified the Appellant of he intent to withdraw and sent him a copy of the motion, the request for an extension of time in which he can reply and a copy of the brief filed by counsel.

Signed and Dated this 21th Day of July, 2000.


Julie George
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing appellate brief was mailed first class postage, pre-paid, on this 21st day of July, 2000, to

UTAH ATTORNEY GENERAL'S OFFICE
CRIMINAL APPEALS DIVISION
P.O. BOX 140854
SALT LAKE CITY, UTAH 84114-0854

GILBERT ARVIZO
UTAH STATE PRISON
INMATE NO.
P.O. BOX 250
DRAPER, UTAH 84020

A handwritten signature in black ink, appearing to read "Gilbert Arvizo", written over a horizontal line.